

(2023) 04 CAL CK 0021
In the Calcutta High Court
Case No : WPA No. 21101 Of 2017

Satyabrata Giri

APPELLANT

Vs

State Of West Bengal & Ors.

RESPONDENT

Date of Decision : 11-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Citation : (2023) 04 CAL CK 0021

Hon'ble Judges : Shampa Sarkar, J

Bench : Single Bench

Advocate : Binoy Kumar Das, Chaitali Bhattacharyya, Mrinal Kanit Ghosh

Final Decision : Dismissed

Judgement

Shampa Sarkar, J

1. The case of the petitioner as averred in the writ petition are as hereunder:-

(a) The father of the petitioner joined the post of Compounder-cum-Dresser in a part-time Homoeopathy Charitable Dispensary of Nij-Kasba No.5 Gram Panchayat on and from March 20, 2003. Pursuant to a resolution adopted at the 15th meeting of Nij-Kasba No.5 Gram Panchayat, the petitioner had been so engaged. Such decision was taken by the panchayat authorities as the petitioner's father had fallen ill and failed to attend to his duties on a regular basis.

(b) The concerned gram panchayat issued an appointment letter to the petitioner as a temporary Compounder-cum-Dresser of the said Homoeopathy Charitable Dispensary dated January 13, 2006, as the father of the petitioner had stopped working.

(c) Such letter was issued on the basis of a resolution dated January 13, 2006 adopted at the 11th meeting of the Nij-Kasba No.5 Gram Panchayat.

(d) On and from January 13, 2006, the petitioner rendered continuous service but without any remuneration. On January 21, 2010 at the 25th meeting of the

gram panchayat, a resolution was adopted to pay Rs.500/-per month to the petitioner, with effect from April 1, 2009, out of the panchayat's fund.

(e) Subsequently, the petitioner made an application to the Pradhan for enhancement of remuneration. In the 8th meeting of the gram panchayat a resolution was adopted on August 10, 2011 by which the remuneration was increased to Rs. 800/-.

(f) The Block Development Officer, Khejuri-II Development Block sent a list of casual/daily rated/contractual workers engaged in Panchayati Raj bodies to the Additional District Magistrate (Development), Purba Medinipur. In the said list, the petitioner's name appeared at serial No.15. Sometime in 2012, the District Panchayats & Rural Development Officer, Purba Medinipur also sent a report dated March 29, 2012 to the Commissioner, Panchayats & Rural Development, West Bengal which included the names of casual/daily rated/contractual workers in the said district of Purba Medinipur. The name of the petitioner appeared at serial No. 9.

(g) From the date of appointment, the petitioner had been working but suddenly the remuneration was stopped from April 2016. The petitioner drew Rs.800/- on and from August 2011 to April 2016. He was asked to stop attending the dispensary thereafter.

(h) The petitioner came to know that remuneration payable to casual/daily rated/contractual workers who had been engaged in block offices, head quarters and regional offices against sanctioned posts, under the department of Panchayats & Rural Development, were allowed enhanced remuneration with effect from May 1, 2013. The petitioner prayed for enhanced remuneration @ Rs.8,500/- per month and thereafter @ Rs.11,000/- per month.

(i) The Block Development Officer sought for clarification from the Pradhan of Nij-Kasba No.5. Gram Panchayat and the Pradhan forwarded the documents relating to the engagement of the petitioner to the Block Development Officer.

(j) As no steps were taken by the authority in this regard, the petitioner approached the District Magistrate, Purba Medinipur, Sabhadhipati, Purba Medinipur Zilla Parishad, the District Panchayats & Rural Development Officer, Purba Medinipur, the Chief Medical Officer of Health, Purba Medinipur and the Block Development Officer, Khejuri-II as also the Pradhan of Nij-Kasba No.5 Gram Panchayat, for necessary action.

(k) As the authorities failed to take steps, finding no other alternative, the petitioner filed W.P. 29565(W) of 2014. The writ petition was disposed of by a co-ordinate Bench of this Court directing the Block Development Officer Khejuri-II to dispose of the petitioner's representation for enhanced remuneration, within six weeks from the date of communication of the order. It was further directed that if the claim of the petitioner was found to be legitimate, enhanced remuneration should be disbursed and the arrears should be paid in equal monthly instalments

beginning from the month from which the enhanced rate was made applicable by the government. In case the petitioner was found ineligible, a reasoned order was to be passed.

(l) The petitioner was called for a hearing and was allowed to furnish necessary documents in support of his claim. The Block Development Officer, Khejuri-II passed an order on April 20, 2016 rejecting the claim of the petitioner. The ground for rejection was ineligibility to get the enhanced remuneration as the petitioner had not been engaged in terms of Notification No. H/AUH/379/3H-270/85-I dated May 23, 1988. The petitioner failed to produce relevant documents on the basis of which he had been selected. The call letter for the interview and the documents indicating that the petitioner had the requisite qualification for such appointment could not be produced. The resolution of the Nij-Kasba No.5 Gram Panchayat on the basis of which the petitioner was allegedly engaged on and from March 20, 2003, also did not contain the decision to engage the petitioner permanently.

(m) Such order was challenged by the petitioner by filing writ petition being in W.P. 12547(W) of 2016. The said writ petition was disposed of by a co-ordinate Bench of this Court and the order passed by the Block Development Officer was set aside.

(n) The co-ordinate Bench held that the order impugned before it, did not reflect that the letters dated August 12, 2011 and March 29, 2012 issued by the Block Development Officer and the District Panchayats & Rural Development Officer respectively, had been taken into consideration. The Court observed that the letters indicated that the petitioner had always been treated as a casual/daily rated/contractual worker under the said gram panchayat. Accordingly, the writ petition was disposed of directing the District Magistrate Purba Medinipur to re-visit the issue and to take a fresh decision, in accordance with law.

(o) The District Magistrate Purba Medinipur, by an order dated June 13, 2017, rejected the claim of the petitioner for enhanced remuneration on the ground that the petitioner had not been engaged as a part-time Homoeopathy Compounder-cum-Dresser, by maintaining the guidelines and the scheme under which such engagement had been made. The rules and the norms of the Department of Health and Family Welfare with regard to engagement of part-time Homoeopathy Compounder-cum-Dresser, had not been followed. The money that was paid to the petitioner was in the nature of honorarium, sourced from the panchayat's own fund.

(p) The said order of the District Magistrate has been impugned in this writ petition.

2. The writ petition had come up for hearing before another learned Judge and the same was allowed. The co-ordinate Bench was of the view that the affidavit-in-opposition filed on behalf of the respondent No.6 could not be accepted without proper averment regarding authority of the deponent. The prayers were

allowed by applying the doctrine of non-traverse. The co-ordinate Bench passed orders in terms of prayers 'A' and 'B' of the writ petition. The state respondents preferred an appeal against the judgment and order passed by the co-ordinate Bench allowing the instant writ petition dated July 9, 2019. The Hon'ble Division Bench disposed of the appeal allowing the state respondents to file a recalling application before the Single Judge having jurisdiction. A recalling application was filed before this Court, which was registered as CAN 2 of 2022. The application came up for hearing before this Court and was allowed with reasons. The order of the co-ordinate Bench allowing the writ petition, was recalled. Thereafter, the state respondents were again allowed to file a further affidavit dealing with the contentions of the writ petitioner.

3. The Block Development Officer, Khejuri-II Development Block filed the affidavit-in-opposition for self and on behalf of the District Magistrate, Purba Medinipur. It was contended that the Department of Health and Family Welfare had issued a Notification No. H/AUH/379/3H-270/85-I dated May 23, 1988 for appointment of part time Homeopathy Medical Officer and Compounder-cum-Dresser in each gram panchayat which intended to set up a state aided homeopathy dispensary. The notification laid down the procedure to be followed in the matter of selection of sites, approval of sites, engagement of medical officer, compounder and the honorarium to be paid to the medical officer and compounder etc., when the dispensaries would start functioning.

4. According to Clause-6 of the said notification the dispensary was to remain open for at least four hours on each working day, as would be determined by the concerned gram panchayat. Each dispensary was to be manned by one part-time Medical Officer and one part-time Compounder-cum-Dresser. In order to qualify for the post of compounder, the candidate should be registered in Part-B of the register of registered homeopathic practitioner, maintained by the Council of Homeopathic Medicine, West Bengal or should have VIII pass certificate and experience as a homeopathic compounder for at least five years under a homeopathic doctor. The relevant clause is set out below:-

"Compounder:- The candidate either should be registered in Part 'B' of register of registered homeopathic practitioner maintained by the Council of Homeopathic Medicine, West Bengal or they should have class VIII certificate and experienced as a Homeopathic compounder for at least five (5) yrs. under a Homeopathic Doctor, registered in Part 'A' of the State Homeopathic council."

5. A part-time compounder was to be paid monthly remuneration of Rs.150/- out of the funds released as grant-in-aid by the Department of Health and Family Welfare, Government of West Bengal. Allotment of fund and the accounting procedure as per the said notification, was as follows:-

"1. The staff of an approved dispensary will be engaged by the Pradhan of the concern Gram Panchayat under such terms and conditions as may be issued by the Department of Health and Family Welfare from time to time.

2. The Janaswastha Sthayee Samities of the Panchayat Samities will review the working of the respective Gram Panchayat Homeopathic dispensaries periodically and tender such advice as may be called for in the interest of the public service.

3. The records and registers to be maintained at the dispensary will be prescribed by the Janaswastha Sthayee Samiti of the Panchayat Samiti."

6. By a notification dated March 3, 2005, the qualification of the compounder was amended as follows:-

"Qualification of Compounder:

The qualification of Compounder-cum-Dresser will be as following:

(a) The candidates either should be registered in part 'B' (of the Register of registered Homeopathic Practitioners maintained by the Council of Homeopathic Medicine, West Bengal) or they should have the Certificate of one year Pharmacy Course conducted by the Council of Homeopathic Medicine, West Bengal."

7. According to the state respondents, the procedure to be followed for engagement of Compounder-cum-Dresser in the homeopathy dispensary under the Nij-Kasba No.5 Gram Panchayat, had not been followed. It was further contended that the petitioner also did not have the requisite qualification in terms of the notification dated March 3, 2005 which amended the clause relating to the minimum qualification of a compounder, stated in the notification dated May 23, 1988.

8. The issue is whether the petitioner would be entitled to enhanced remuneration in terms of the government notifications issued from time to time. Those notifications provide enhanced remuneration and security of tenure of service to contractual/daily rated and casual employees under any government department or local bodies etc. The documents relied upon by the petitioner which are annexed by the writ petition do not indicate that the petitioner had been appointed as a part-time Compounder-cum-Dresser in the homeopathy dispensary under the said gram panchayat through any selection process. The resolution of the gram panchayat dated March 20, 2003, on which the petitioner places strong reliance, indicates that the gram panchayat had decided to engage the petitioner in the event the father of the petitioner would become incapable of rendering service as the Compounder-cum-Dresser, due to failing health. The said resolution indicates that the petitioner had been helping his father, intermittently as and when his father would fall ill.

9. Although the petitioner claims that the date of the said resolution, i.e., March 20, 2003, should be reckoned as the date of appointment of the petitioner as a Compounder-cum-Dresser in the said gram panchayat, this Court finds that the resolution reflected the desire of the gram panchayat to engage the petitioner as a part-time Homeopathy Compounder-cum-Dresser, in case the petitioner's father, the actual incumbent, would ultimately fail to render his service on account of his illness. The service rendered by the petitioner was found to be

satisfactory, but only as his father's helper. permission was granted by the Pradhan on March 20, 2003 allowing the petitioner to help his father. The Pradhan stated in the said letter granting permission that in case Ashoke Kumar Giri, part-time Homeopathic Compounder-cum-Dresser was unable to discharge his duties, the petitioner would be engaged. The letter granting permission was a communication of the resolution which was adopted by the gram panchayat on March 20, 2003. The health of the petitioner's father deteriorated and the gram panchayat adopted a further resolution on January 13, 2006 to the effect that on account of the inability of the petitioner's father to render his service as a Homeopathic Compounder-cum-Dresser of the Charitable Dispensary of Nij-Kasba No.5 Gram Panchayat, the request of the petitioner's father to engage the petitioner could be accepted.

10. The said resolution was communicated to the petitioner and a letter engaging the petitioner was issued on January 13, 2006. The authority found the petitioner to be successful at an interview. The petitioner was informed that upon approval from the state government and on receipt of funds, the remuneration of the petitioner would be determined and fixed. As a financial crunch was prevailing in the gram panchayat, the petitioner could not be paid.

11. Thus, on and from January 13, 2006, the petitioner was asked to join as a part-time Compounder-cum-Dresser in the Charitable Dispensary of the said gram panchayat. The petitioner's father was alive at the relevant point of time. By a resolution dated January 21, 2010, the panchayat authorities decided to pay Rs.500/- per month to the petitioner with effect from April 1, 2009. The remuneration was thereafter increased to Rs.800/-. However, the payment was made from gram panchayat's own fund.

12. From the facts which have been stated hereinabove, it is clear that on and from March 20, 2003, the petitioner had been helping his father, intermittently. The petitioner's father had been unwell and could not discharge his duties as a part-time Homeopathic Compounder-cum-Dresser, on a regular basis. The gram panchayat was pleased with the petitioner's sincerity and had adopted a resolution to engage the petitioner in the said post, in case his father was totally incapable of rendering service. These resolutions were intimated to the petitioner which the petitioner claims to be his appointment letters. Whereas, the letters which were issued by the gram panchayat only indicated the intention of the gram panchayat to retain the service of the petitioner in the post of Homeopathic Compounder-cum-Dresser, in the event the petitioner's father was completely indisposed.

13. Thus, the engagement of the petitioner from 2003 was not as a regular employee of the gram panchayat. He was only a helper to the doctor and had been filling in for his father. He did not have the qualification of at least five years experience. The petitioner was engaged by a letter dated January 13, 2006 when his father had been rendered completely incapable of serving, but his father was the actual incumbent to the post. The post was still held by the petitioner's

father. The father of the petitioner expired on November 26, 2006. The petitioner's engagement on January 13, 2006, was subject to the approval of the state government and without any remuneration as the financial position of the gram panchayat was not vibrant. However, there was an undertaking that in case the financial crunch was over, remuneration from the funds of the gram panchayat would be paid. Pursuant to a decision of the gram panchayat, the petitioner was allowed to work and was paid some remuneration upto April 2016. Thereafter he was asked to attend the dispensary. No recruitment process had been conducted and the engagement of the petitioner was against a part-time post and at a time when the incumbent to the said post, was alive. The petitioner was merely a substitute and such decision was taken by the gram panchayat presumably on humanitarian grounds, but not as per the notification dated March 23, 1988. No approval was given by the higher authorities although the engagement was made subject to such approval.

14. The engagement of the petitioner from January 2006 was not in terms of the notification and the petitioner did not qualify for the post as he was neither registered in Part-B of the Register for the Registered Homeopathic Practitioners maintained by the Council of Homeopathic Medicine, West Bengal nor did he have a certificate of one year pharmacy course conducted by the Council of Homeopathic Medicine, West Bengal as required by the amendment to the qualification. Moreover, the notification indicates that the post was for a part-time Compounder-cum-Dresser. A monthly honorarium was to be paid to such compounder and the duration of work was for four hours per day. Thus the petitioner could not be treated at par with those casual/daily rated/contractual workers under various departments of the State Government and the local bodies who were granted enhanced remuneration on the basis of the decision of Finance Department.

15. Moreover, in the affidavit-in-opposition, documents have been annexed which indicate that the proposal sent to the authority by the erstwhile Block Development Officer and the District Panchayats & Rural Development Officer, enlisting the petitioner as a casual/daily rated/contractual worker was not accepted and the Secretary, Purba Medinipur Zilla Parishad intimated the Block Development Officer not to engage any more part-time Homeopathic Compounder-cum-Dresser to such gram panchayats where there were resultant vacancies due to death/resignation/incapacitation of the incumbent. Such decision was communicated vide Memo No. HF/O/ISMH/372/3H-110/06, dated May 31, 2007 issued by the Department of Health & Family Welfare, (ISM & H Branch), Government of West Bengal.

16. Thus, the contention of the petitioner that he should have been considered to be a contractual/daily rated/casual worker in the said gram panchayat on the basis of the communication of the Block Development Officer and District Panchayats & Rural Development Officer, cannot be accepted. As the government had decided not to fill in the resultant vacancy which occurred due to death/

resignation/incapacitation of the incumbent, the petitioner could not have been appointed in the post Homeopathic Compounder-cum-Dresser. On account of illness of his father who was still alive at the time of his engagement in January 2006, the petitioner was allowed to help. The father of the petitioner expired on November 26, 2006 and from May 2007 the authority had decided not to fill up these vacancies which is indicative of the fact that the policy was to be discontinued with. Moreover, the memo dated December 06, 2013 relied upon by the petitioner indicates that enhanced remuneration could be given only in cases of appointment where the provisions of memo No.9008-F(P) dated September 16, 2011 of Finance Dept. (Audit Br.) Govt. of West Bengal, had been strictly followed.

17. Letter dated December 6, 2013 issued by the Special Secretary to the Government of West Bengal allowing enhanced remuneration, is set out below:-

"No. 6077-RD/Block/5M-7/2011(Pt.I) Date: The 6th December, 2013 ORDER

The remuneration of the Casual/Daily Rated/Contractual Workers who have remained engaged in Block Offices/District Head Quarters and the Regional Offices against any sanctioned post under this Department, is hereby enhanced as per rates stated below w.e.f. 1.5.2013.

Sl No.

Period of engagement

Gr. C

Gr. D

i.

Less than 10 years

Rs.8,500/-p.m.

Rs.7,00/-p.m.

ii.

More than 10 years

Rs.11,000/-p.m.

Rs.8,500/-p.m.

2. The number of years of engagement is to be determined as on 1.4.2013

3. All concerned are being informed accordingly. In each case the provisions of Memorandum No.9008-F(P) dated 16.09.2011 of Finance Deptt (Audit Br.) Govt. of West Bengal shall have to be strictly followed.

4. This order is issued in pursuance of Finance Department (Audit Brach)

Memorandum No.4011-F(P), dt. 20.05.2013.

Sd/-D. Sarker

Special Secretary to the
Government of West Bengal"

18. In this case, the provisions of memo No.9008-F(P) dated September 16, 2011 was not followed. Some of the conditions to be fulfilled, are quoted below:-

"(i) The casual/daily rated/contractual workers who have rendered 10 years of service continuously with at least 240 days attendance each year may remain engaged in the same status and capacity till their attaining the age of 60 years.

The continuity of service shall have to be certified by a competent officer not below the rank of Assistant Secretary in the case of a Secretariat Department, Director in the case of a Directorate and Assistant Engineer/S.D.O./B.D.O. in the case of Regional Offices. The concerned officer, who certifies may be advised to exercise extreme precautions and take assistance of an office of WBA & AS, if necessary.

: : :

: : :

(x) The provisions of this Order will not be applicable where contractual engagement has been made without any sanctioned post and for any specific project for very temporary period upto a maximum 6 (six) years or finishing up of the project whichever is earlier. Thus in such cases steps will not be required to be initiated for filling up the posts through regular appointments as per the Recruitment Rules, since the posts are temporary by nature."

19. Moreover, the Department of Health and Family Welfare had decided not to engage any more part-time Homeopathic Compounder-cum-Dresser to homeopathy dispensaries of the gram panchayats. The memo No. HF/O/ISMH/372/3H-110/06, dated May 31, 2007 issued by the Department of Health & Family Welfare, (ISM & H Branch), Government of West Bengal, in this regard, is quoted below:-

"From: O.S.D. & E.O. Deputy Secretary to the Govt. of West Bengal To: B. Ghosh, O.S.D. & Ex-Officio Deputy Secretary to the Govt. of W.B.

And State Coordinator, Public Health Cell, Panchayat & Rural Development Deptt., W.B., Jessop Building, 63, N.S. Road, Kolkata 700001

MEMORANDUM

The undersigned is directed to say that the Department of Health and Family Welfare has decided not to engage any more part-time Homeopathic Compounder-cum-Dressers to those Gram Panchayat Homeopathic Dispensaries

where there are resultant vacancies due to death/resignation/in capacitance.

Sd/-

O.S.D. & E.O. Deputy Secretary

Kolkata, The 31st May 2007."

20. The gram panchayat engaged the petitioner on their own accord, without following the procedure. No selection was held. The approval of the state government to engage the petitioner had not been taken. The proposal to engage had neither been sent to the panchayat samiti nor to the Zilla Parishad. The payment was made from the funds of the gram panchayat. No resolution was adopted by the gram panchayat on the basis of any merit list. The decision was taken on the plea that the late father of the petitioner had requested that the petitioner be engaged either in his absence or in case he was unable to discharge his duties. The petitioner also did not have the requisite qualification when he was engaged, either to help his father or even on January 20, 2006. The authority had decided not to fill in the vacancies in the post of part-time Homeopathy Compounder-cum-Dresser on and from 2007. Thus the petitioner could not have continued his service, in any case. The petitioner admitted to have received remuneration from April 2009 to April 2016 from the funds of the gram panchayat. The duration of service per day was not for the whole day, but for four hours.

21. The petitioner also could not have been engaged when his father was alive. The entire arrangement between the petitioner, the petitioner's late father and the panchayat authorities was a private one and at best out of humanitarian grounds. The sincerity and diligence of the petitioner who had helped out during the illness of his father, cannot be a ground for accepting the engagement of the petitioner to the post of Compounder-cum-Dresser to be valid and in accordance with law. Thus, the claim of the petitioner for enhanced remuneration in terms of the memo dated December 6, 2013 cannot be allowed.

22. In M.P. State Coop. Bank Ltd., Bhopal vs. Nanuram Yadav & ors. reported in (2007) 8 SCC 264, the Hon'ble Apex Court held as follow:-

"(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back-door should go through that door."

23. In the decision of Secretary, State of Karnataka & Ors. v. Umadevi & Ors., reporter in AIR 2006 SC 1806, the Hon'ble Apex Court held that any appointment made in violation of the statutory rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. Here, preferential treatment was given to the petitioner and he was engaged without any selection process.

24. In State of Orissa & Anr. v. Mamata Mohanty reported in (2011) 3 SCC 436, the Hon'ble Apex Court held as follows:-

"Therefore, it is a settled legal proposition that no persons can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

25. In State of U.P. & Ors. V. U.P. State Law officers Association & Ors., reported in AIR 1994 SC 1654, the Hon'ble Apex Court while dealing with back-door entries in public appointment observed as under:

"The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the appointments made will not be on the considerations other than merit. In the absence of guidelines, the appointment may be made purely on personal or political consideration and be arbitrary. This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by back-door have to go by the same door....From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."

26. The Hon'ble Apex Court discouraged the practice of the Courts to adopt a humane approach by allowing a person who had worked for a long time, to be continued illegally. The Courts do not have power to override rules and regulations for engagement even to part-time posts, as those are public engagements made on the basis of notifications and government orders issued from time to time. The eligibility criteria and the qualifications mentioned, have to be mandatorily adhered to. Experience gained by the petitioner cannot be equated with the educational qualification that was required to be possessed by him for being considered for the post of part-time compounder-cum-dresser in the homeopathy dispensary of the Nij-Kasba No.5 Gram Panchayat. The order impugned is not interfered with.

27. The writ petition is dismissed.

28. Parties are directed to act on the server copy of this judgment.